STATE OF MICHIGAN

COURT OF APPEALS

JAY B. SCHREIER and MICHELLE H. SCHREIER, Plaintiffs-Appellees, v ARTHUR SOLOMON, Defendant-Appellant.	UNPUBLISHED September 23, 2008 No. 277687 Oakland Circuit Court LC No. 06-079519-CK

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant Arthur Solomon appeals by leave granted[1] a trial court order denying his motion for summary disposition under MCR 2.116(C)(7) pending resolution of plaintiffs Jay B. and Michelle H. Schreier's motion for summary disposition under MCR 2.116(C)(10) on the issue whether an arbitration provision in a construction agreement is invalid for lack of mutuality of obligation to arbitrate, as well as a trial court order granting summary disposition to plaintiffs on that issue and staying arbitration. We reverse both the trial court's order denying defendant's motion for summary disposition and the trial court's order granting plaintiffs' motion for summary disposition and staying arbitration and remand for entry of an order granting defendant's motion for summary disposition under MCR 2.116(C)(7).

I. Facts and Procedural History

On October 31, 2003, plaintiffs entered into a standard construction agreement with Southwick Builders. Defendant is president of Southwick Builders and signed the agreement. Under the construction agreement, the builder was to make an addition to and renovation of plaintiffs' home. The agreement contained the following arbitration provision:

> The owner acknowledges and agrees that any dispute, claim or cause of action of any kind that they may maintain under this Agreement shall be submitted to

[1] *Schreier v Solomon*, unpublished order of the Court of Appeals, entered December 19, 2007 (Docket No. 277687).

> binding arbitration, administered by the Southfield, Michigan office of the American Arbitration Association under its Commercial Arbitration Rules, which shall be submitted to and heard by one (1) arbitrator. Any award rendered by such arbitration shall be binding upon the parties, and a judgment on such award may be entered by the Oakland County Circuit Court as the exclusive court of competent jurisdiction. [Construction Agreement, ¶ 29.]

A dispute arose between plaintiffs and defendant, and defendant filed a demand for arbitration, seeking damages of $131,000 for work performed on plaintiffs' home. Defendant later filed an amended demand for arbitration, seeking damages of $136,540. Plaintiffs filed a counter-demand for arbitration, seeking damages of $150,000 for the builder's alleged breach of the construction agreement. Less than one month after they filed their counter-demand for arbitration, plaintiffs filed suit in the Oakland County Circuit Court against defendant. Plaintiffs' first amended complaint contained claims of fraud in the inducement, silent fraud, and breach of fiduciary duty. Plaintiffs' first amended complaint also contained a claim for declaratory relief. Plaintiffs sought a declaration that the arbitration provision in the construction agreement was unenforceable based on a lack of mutuality because it required plaintiffs, but not defendant, to pursue any claim, dispute or cause of action under the agreement in arbitration, or, in the alternative, that plaintiffs' claims in its first amended complaint arose outside the scope of the arbitration provision because they did not arise under the construction agreement.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' claims were within the scope of the arbitration provision and were therefore required to be arbitrated. Plaintiffs moved for summary disposition under MCR 2.116(I)(2), arguing that the arbitration provision was unenforceable for lack of mutuality of obligation to arbitrate and that the claims in their first amended complaint were outside the scope of the arbitration provision and therefore were not required to be arbitrated. Plaintiffs also filed a separate motion for summary disposition of their claim for declaratory relief under MCR 2.116(C)(10), again arguing that the arbitration provision was unenforceable based on lack of mutuality. In an opinion and order dated March 7, 2007, the trial court denied defendant's motion for summary disposition, stating: "Because the amended complaint pleads grounds for rescinding or revoking the contract, the defendant's motion must be denied pending resolution of the plaintiffs' claims that the contract is not valid." The trial court also denied plaintiffs' motion under MCR 2.116(I)(2).

In an opinion and order dated April 6, 2007, the trial court granted plaintiffs' motion for summary disposition, ruling that the arbitration provision was unenforceable:

> In *Berna v Little Valley Homes, Inc.*, unpublished decision of the Michigan Court of Appeals, No. 202091, September 8, 1998, the Court of Appeals stated, "Mutuality of arbitration is also required, as one party cannot be forced to arbitrate while the other party merely has the option to arbitrate."
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> In this case, the plaintiffs as owners agreed that any claim they might have under the construction agreement must be submitted to arbitration. Agreement, para. 29. There is no corresponding agreement that the defendant's claims would also be subject to arbitration. Thus, the defendant can demand arbitration but the

> plaintiff cannot. The plaintiffs have agreed to submit their claims to arbitration but the builder has not.
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> As defined by *Zeniuk* [*v RKA, Inc*, 189 Mich App 33, 41; 472 NW2d 23 (1991)] and *Horn* [*v Cooke*, 118 Mich App 740; 325 NW2d 558 (1982)], the parties' agreement is not a binding arbitration agreement because only one side has agreed to arbitration. The court finds for the plaintiffs that this unilateral obligation is unenforceable.

II. Standard of Review

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

We also review de novo issues of contract interpretation. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

III. Analysis

Defendant argues that the trial court erred in ruling that the arbitration provision was unenforceable because it lacked mutuality of obligation.

Michigan public policy overwhelmingly favors arbitration as an inexpensive and expeditious alternative to litigation. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 123; 596 NW2d 208 (1999). Arbitration agreements are generally interpreted in the same manner as ordinary contracts. *Bayati v Bayati*, 264 Mich App 595, 599; 691 NW2d 812 (2004). When presented with an arbitration agreement which contains a potentially improper provision, a court should attempt to interpret the provision in a way which renders it valid and enforceable

according to the presumed intent of the parties. *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 306; 690 NW2d 528 (2004). "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000). "The burden is on the party seeking to show nonarbitrability." *Rembert, supra* at 129.

The trial court ruled that the arbitration provision was unenforceable due to lack of mutuality of obligation to arbitrate. However, the courts of this state have recognized that "[t]he enforceability of a contract depends . . . on consideration and not mutuality of obligation." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980); *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005). In *Hall*, this Court stated:

> "'By "mutuality of obligation" is apparently meant that there must be consideration, without which there is no obligation on either party because there is no binding contract.'" *Reed v Citizens Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993) (citations omitted); see also 1 Restatement Contracts, 2d § 79 ("If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'") Thus, "[t]he enforceability of a contract depends . . . on consideration and not mutuality of obligation." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980) (citations omitted). [*Hall, supra* at 334.]

In this case, the trial court erred in ruling that the arbitration provision was unenforceable due to the lack of mutuality of obligation to arbitrate. Rather, the trial court should have focused its analysis on whether the construction agreement was supported by consideration. *Toussaint, supra* at 600; *Hall, supra* at 334. When there is no separate consideration for a specific provision in a contract, but the provision "is part of a larger contract involving multiple promises, the basic rule of contract law is that whatever consideration is paid for all of the promises is consideration for each one . . . ." *Hall, supra* at 334, quoting *Rowady v K Mart Corp*, 170 Mich App 54, 59; 428 NW2d 22 (1988). In *Hall*, the provision at issue was a release, but this Court's reasoning in *Hall* applies equally to an arbitration provision because the reasoning flows from the basic rule of contract law that when a contract involves multiple promises, whatever consideration is paid for all of the promises is consideration for each one.

In *Wilson Electrical Contractors, Inc v Minnotte Contracting Corp*, 878 F2d 167, 169 (CA 6, 1989), the Sixth Circuit Court of Appeals addressed the issue of the validity of an arbitration clause that required one party, but not the other, to arbitrate any controversy or claim arising out of or relating to the contract at issue in that case or a breach of the contract. The Sixth Circuit held that the arbitration clause was enforceable and did not require separate consideration "[b]ecause the contract as a whole did not lack consideration . . . ." *Id.* at 169. Although we are not bound by the Sixth Circuit's decision in *Wilson*, we may follow it if the reasoning is persuasive. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). We are persuaded by *Wilson* because it is consistent with our decision in *Hall* and the basic rule of contract law that when a contract involves multiple promises, whatever consideration is paid for all of the promises is consideration for each one.

The arbitration provision at issue in this case was part of the larger construction agreement between plaintiffs and defendant. Our review of the construction agreement reveals that plaintiffs agreed to pay $308,540 in exchange for defendants' numerous promises regarding

the renovation of and addition to plaintiffs' home. Neither party argues that the construction agreement as a whole lacked consideration, and we find that there was consideration supporting the construction agreement for the renovation of and addition to plaintiffs' home, and this consideration supports the arbitration provision. There was no separate consideration required for the arbitration provision. See *Hall*, *supra* at 334.

In ruling that the arbitration provision was unenforceable based on lack of mutuality, the trial court relied on this Court's opinion in *Horn*, *supra*, and the dissenting opinion in *Zeniuk*, *supra*. The trial court erred in relying on *Horn* and the dissenting opinion in *Zeniuk* because, contrary to the trial court's conclusion, these cases simply do not stand for the proposition that an arbitration provision that binds only one party to arbitration is unenforceable. In *Hall* and the dissenting opinion in *Zeniuk*, this Court recognized that an arbitration agreement is a contract, requiring the mutual assent of the parties. *Hall*, *supra* at 744; *Zeniuk*, *supra* at 41 (Wahls, J., dissenting.) However, "mutuality of assent" is distinct from the concept of "mutuality of obligation," and, as stated above, "[t]he enforceability of a contract depends . . . on consideration and not mutuality of obligation." *Toussaint*, *supra* at 600. In this case, the consideration for the construction contract supported the arbitration provision.

The trial court also relied on this Court's unpublished opinion in *Berna v Little Valley Homes, Inc*, unpublished opinion of the Court of Appeals, issued September 8, 1998 (Docket No. 202091), in ruling that the arbitration provision was unenforceable based on lack of mutuality. In *Berna*, this Court stated: "Mutuality of arbitration is also required, as one party cannot be forced to arbitrate while the other party merely has the *option* to arbitrate. A court cannot require a party to arbitrate an issue that the party has not agreed to submit to arbitration." (Emphasis in original; footnote omitted.) We are not bound by *Berna*, however, because it is an unpublished opinion and is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). We decline to follow it because it is inconsistent with the public policy in Michigan favoring arbitration and because it conflicts with our holding in *Hall* and the general rule of contract law that when a contract involves multiple promises, whatever consideration is paid for all of the promises is consideration for each promise.

Defendants next argue that because the arbitration provision is enforceable, the trial court erred in failing to grant summary disposition of all plaintiffs' claims in favor of defendant. According to defendants, plaintiffs' claims of fraud in the inducement, silent fraud, and breach of fiduciary duty all fell within the scope of the arbitration provision and should have been arbitrated. Although defendant raised the issue whether plaintiffs' claims arose "under" the construction agreement, the trial court did not address it because it determined that the arbitration provision was unenforceable. Whether an issue is subject to arbitration is a question of law. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). We can decide an issue of law when it was raised below and the facts necessary for resolution have been presented. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004). Therefore, we will address this issue.

Generally, the parties' agreement determines the scope of arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. *Id.* All

conflicts should be resolved in favor of arbitration, and the court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. *Id.* "Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation." *Fromm*, *supra* at 306. Michigan courts clearly favor keeping all issues in a single forum. *Rooyakker*, *supra* at 163.

In this case, there is an arbitration provision in the construction agreement, and plaintiffs' fraud in the inducement, silent fraud, and breach of fiduciary duty claims are not expressly exempted from arbitration under the construction agreement. Thus, the question is whether plaintiffs' claims are arguably within the arbitration clause. *Id.* We conclude that they are. The arbitration provision at issue is broad, requiring arbitration of "any dispute, claim or cause of action of any kind . . . under this Agreement[.]" We conclude that plaintiffs' fraud in the inducement claim was arguably a claim "under" the construction agreement because the allegedly false representations concerned defendant's improper performance under the construction agreement. Plaintiffs' silent fraud and breach of fiduciary duty claims also arguably arose "under" the construction agreement. Plaintiffs' silent fraud claim is based on defendant's alleged false representations regarding whether a crawl space and the sub floor above it would support a kitchen with a stone floor, an island, marble counter, and a double oven. Plaintiffs allege that defendant breached his fiduciary duty by misrepresenting the status and integrity in the construction of the renovation, by attempting to guide decisions to increase defendant's profits at the expense of quality, and by requesting funds based on his personal financial situation rather than the status of the construction job. Both plaintiffs' silent fraud and breach of fiduciary duty claims seek damages for defendant's allegedly improper performance under the construction agreement. Mindful that we must resolve any doubts about the arbitrability of an issue in favor of arbitration, *Watts*, *supra* at 608, and of the preference of Michigan courts to keep all issues in a single forum, *Rooyakker*, *supra* at 163, we conclude that plaintiffs' fraud in the inducement, silent fraud, and breach of fiduciary duty claims all arguably arose "under" the construction agreement.

Defendant finally argues that plaintiffs have waived or forfeited any challenge to the arbitration provision because they participated in arbitration for more than one year before filing suit. This issue was not decided by the trial court. We observe that "[t]he existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court, not the arbitrators." *Fromm*, *supra* at 305. In light of our resolution of defendant's other issues on appeal, we need not address this issue on appeal.

Reversed and remanded for entry of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood